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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 700

PACIFIC COAST EUROPEAN CONFERENCE,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the District of Columbia Circuit

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ERRATA TO PETITION FOR CERTIORARI

The following typographical errors in the petition for certiorari filed herein on November 17, 1964, should be corrected as indicated:

1. Page 4, line 6: "November 26, 1964" *should read* "November 26, 1963."
2. Page 18, line 25: following the citation to *Morton Salt,* there should be *added* the words: "(Emphasis supplied)."
3. Appendix B, page 15, line 12: "Section 2(a)" *should read* "Section 3(a)."

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Petitioner Pacific Coast European Conference respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on August 20, 1964.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals, not yet officially reported, is printed as Appendix A hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 20, 1964. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, and Section 1040 of Title 5, United States Code.

QUESTIONS PRESENTED

1. May the Federal Maritime Commission order the "production" at its "offices in Washington" of "letters, memoranda, circulars, and other correspondence or documents" under the guise of calling for a "report" authorized by Section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820)?

2. Is an administrative agency demand sustainable, as a matter either of statutory or Constitutional law, which asserts as the matter under inquiry merely a paraphrase of several, mutually divergent, statutory provisions, and which states as its only purpose or justification an alleged "need" of the agency, "[i]n order that [it] may be properly informed as to matters bearing on its responsibilities"?

3. Is the sweeping obiter dicta of *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), to be read as cover

of authority for any administrative demand, no matter how broad, how burdensome, or how irrelevant, so as effectively to have foreclosed judicial review of such orders; if not, should that sweeping language be re-examined?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are, principally, Section 21 of the Shipping Act, 1916, as amended (46 U.S.C. § 820), and, as bearing on the proper use thereof, Section 27 of the same Act (46 U.S.C. § 826), Section 212(f) of the Merchant Marine Act of 1936 (46 U.S.C. § 1122(f)), Sections 3(a) and 6(b) of the Administrative Procedure Act (5 U.S.C. §§ 1002(a), 1005(b)), and the Fourth Amendment to the United States Constitution. All of these are set forth in Appendix B, *infra*.

Also involved, for comparative purposes, are Sections 6 and 9 of the Federal Trade Commission Act (15 U.S.C. §§ 46, 49); these too are set out in Appendix B.

STATEMENT OF THE CASE

Jurisdiction was vested in the Court of Appeals by virtue of Section 1034 of Title 5, United States Code, authorizing court of appeals review of a final administrative order.

Petitioner Pacific Coast European Conference is an unincorporated association of twenty-one steamship lines

which operate in the foreign commerce of the United States, under an agreement filed with and approved by a predecessor agency of the Federal Maritime Commission in accordance with the provisions of Section 15 of the Shipping Act, 1916, as amended (46 U.S.C. § 814).

On or about November 26, 1964, citing authority of Section 21 of the Shipping Act (46 U.S.C. § 820), the respondent Federal Maritime Commission served upon the administrative chairman of the Conference an order entitled "Foreign Trade Study 63-15" [JA 178-186][1] together with a covering letter accompanying the order [JA 176-178]. Part I of the order, which as will appear hereafter is the only part relevant to the instant dispute, directed the petitioner, "as agent for" its individual member steamship lines, "to produce at the Commission's offices in Washington, D.C.," a mass of vaguely defined documents [JA 179-180].

Like orders were served upon fifteen other conferences of steamship lines covering the major foreign trade routes of the United States. Of these, seven covered export trades and the remaining eight covered import trades.

On or about December 27, 1963, in response to numerous protests, the Commission served upon petitioner and the other fifteen conferences an "Amended Section 21 Order", entitled similarly to the first and differing from

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[1]The full title of the order was "Section 21 Order—Study—The Trade from U.S. West Coast Ports to Ports in Scandinavia and Continental Europe—Foreign Trade Study 63-15."

References to the Joint Appendix, prepared for use as the record in the Court of Appeals and filed in this Court concurrently with this petition, will be designated as "JA ____".

it only in minor respects; under the amended order, compliance was ordered by February 20, 1964 [JA 187-192].

On January 24, 1964, petitioner moved the Commission to reconsider and quash the amended order [JA 219-235]. Similar protests were made by the other conferences. On February 5, 1964, the Commission postponed the compliance date for all of the orders until March 2, 1964 [JA 32]. Thereafter, on February 26, 1964, the Commission served its "Denial of Motions to Reconsider and Vacate or Stay" [JA 33-39]. In an accompanying document the Commission "postponed pending further order of the Commission" compliance with Part II of each of the orders directed to conferences covering export trades [JA 40].

On March 9, 1964, petitioner filed in the Court of Appeals for the District of Columbia Circuit its petition for review of the amended Section 21 order [JA 171-176], together with an application for interlocutory injunction pending court review [JA 216-218].[2] Similar petitions and applications were filed in the same Court on behalf of six other conferences, at or about the same time [JA 40-47, 118-122, 167-171].[3] The cases were consolidated for review. On March 12, 1964, the first two applications for interlocutory injunction were denied, one judge dissenting [JA 251, 252]; on March 20, 1964, the remaining two applications (including petitioner's) were similarly denied, by a different panel, without a dissenting vote

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[2]Petitioner's case was docketed as No. 18477.

[3]Another conference filed as No. 18468, three joined in No. 18471, and two joined in No. 18475.

[JA 253, 254].[4] On August 20, 1964, the Court of Appeals, relying almost exclusively upon this Court's decision in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), entered the order from which the instant petition is taken, sustaining the Commission. Judge Miller dissented without opinion.

REASONS FOR GRANTING THE WRIT

I

THE CASE INVOLVES A QUESTION OF FUNDAMENTAL IMPORTANCE IN THE CONSTRUCTION OF FEDERAL REGULATORY STATUTES

A. In light of the court's holding below, this Court should reexamine the sweeping language of its decision in United States v. Morton Salt Co., 338 U.S. 632 (1950), to determine whether there remain any outer boundaries to an administrative agency's demands for information

Although on its own facts the decision of this Court in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), appeared to represent merely a logical step in the development of administrative law, the sweeping language of the opinion, albeit reasonable in context, has become, for administrative agencies, a carte blanche cover of authority for harassing demands virtually without limitation, and, for the lower federal courts, a stern proscription against judicial "interference" with the full exercise of such agency authority. *Morton Salt* is construed to authorize "fishing expeditions" and to confer upon the various Commissions the inherent powers of a grand jury.

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[4] As petitioner believes that, notwithstanding the denial, the penalties cannot lawfully have attached during the course of the appeal, no error is cited to this denial.

This petition does not present the comparatively simple problem of a federal administrative agency securing information required in policing compliance with its orders properly entered against a domestic enterprise. Here, the Federal Maritime Commission initiated "studies" on an industry-wide basis of both foreign and American steamship companies, covering alleged "disparities" between freight rates from the United States compared to freight rates to the United States in trades with the major maritime nations of the world. The Commission's demands were served upon steamship lines and conferences abroad as well as in the United States.

The Commission's orders, including the order directed to petitioner, aroused an immediate storm of diplomatic protests from other nations. Great Britain enacted special legislation to protect its jurisdiction against the demands. Other countries have taken similar action. Diplomatic negotiations have been in progress over the orders for many months without any final determination at this time. The Commission has suspended some of its orders pending the outcome of the diplomatic negotiations, but not this one.

The subject of the Commission's investigation or "study", *i.e.*, "rate disparities", was treated by the Congress apart from all other rate regulations in foreign commerce. Although all legislative controls over freight rates in foreign commerce are set forth in the Shipping Act, 1916, as amended, to which alone foreign carriers are subject, the Congress treated "rate disparities" only in the Merchant Marine Act of 1936 (46 U.S.C. §§ 1101 et seq.). Recognizing the delicate international problems

involved in unilateral control of international freight rates, Congress declined to delegate to the Commission any regulatory control over "rate disparities". All that was legislated on the subject was Section 212(f) of the 1936 Act (46 U.S.C. §1122(f)),[5] limiting the Commission's authority in the field,

> "To investigate . . . and recommend to Congress measures by which such discrimination may be corrected."

Section 212(e) of the 1936 Act preempts the field entirely so far as the Commission's authority over "rate disparities" is concerned. Legislation has never been enacted making "rate disparities" unlawful.

Instead of investigating and recommending corrective measures to Congress, as it was "directed" to do in 1936, the Commission waited until 1964 to take any action at all. Then, in defiance of the international features of the problem that had deterred Congress from acting against "rate disparities" in 1936, the Commission served its unheralded Section 21 orders together with the accompanying letters "requesting" the shipping industry, including petitioners, (1) "to make appropriate adjustments in your tariffs"[6] *or,* (2) explain the alleged rate

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[5]Originally Section 212(e), 46 U.S.C. §1122(e).

[6]When petitioners attempted to learn from the Commission what it meant by "appropriate adjustments", in view of petitioner's complete ignorance of the rates of other parties with which petitioner's rates were compared by the Commission [JA 235], the Chairman of the Commission answered that "the Commission has not determined that any of the rates in the Conference tariff are unlawful . . . ." and could not explain "what adjustments" it had asked petitioner to make in its tariff of freight rates [JA 236, 237].

disparities and comply with the demand for production of records involved in this petition.

The Commission's action aims at eliminating all "rate disparities" throughout the foreign commerce of the United States in lieu of investigating them and recommending corrective measures to the Congress. As the means to its end, the Commission "requested" "appropriate adjustments" only in freight rates from the United States ports to foreign ports. Although the Commission served production orders upon carriers and conferences from foreign ports to United States ports, it did not request "appropriate adjustments". The production order under review was not really a study at all but a penalty, invoked as an alternative form of compliance if petitioner failed "to make appropriate adjustments in [its] tariffs" as "requested" in the accompanying letter. While, in the aggregate, the Commission "requested" thousands of arbitrary rate adjustments, the Chairman of the Commission has reported only that, as a result of the Commission's inquiry, "the rate on Bourbon to England has been lowered to that of Scotch from England to the United States."[7]

The instant case represents an example of how far the dicta of *Morton Salt*, relied upon by the Commission, has strayed from its original framework. The order can be sustained, if at all, only on *Morton Salt's* ostensible sanction of unfettered "official curiosity"[8] and a boundless

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[7]Public Address delivered October 29, 1964, reported by *Congressional Information Bureau*, October 29, 1964, Vol. 68 Cargo—No. 220.

[8]338 U.S. at 652.

"power of inquisition . . . analogous to the Grand Jury".[9] As admitted on the very face of the order [see JA 188], its only purpose (except for the unauthorized one described above) was, in Mr. Justice Holmes' words, to "search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up."[10]

Although *Morton Salt*, in tracing the development of administrative law, noted the decline of the "colorful and nostalgic slogan 'no fishing expeditions,'"[11] petitioner cannot believe that the Court meant by this "to sweep" not only "all our traditions" but, as well, all prior case law, statutes and Constitution, "into the fire."[12] *Morton Salt* did not involve a "fishing expedition"; the present order admittedly and unabashedly does. It is not a "nostalgic slogan" which is concerned here, but a basic principle of American law. This Court should resolve whether or not the important legal principle still retains vitality, in the face of *Morton Salt* and its subsequent administrative construction.

B. The trend established by the Morton Salt dicta and the holding of the court below are entirely out of harmony with the principles behind the increasing confinement of governmental investigatory powers in analogous areas of the law

Since *Morton Salt*, the investigatory power of administrative agencies has steadily mounted to the point where, in the case below, an order has been sustained on

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[9]338 U.S. at 642.

[10]*Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924), roundly condemning such a free-wheeling search as "contrary to the first principles of justice."

[11]338 U.S. at 642.

[12]*American Tobacco, supra*, note 10, 264 U.S. at 305-306.

no more showing than that the agency "needs" the information—to "determine what action"—out of a possible half-dozen, unrelated courses of action—"if any it should take." [JA 188]. Such a meaningless statement of purpose is scarce satisfaction of the "right to know *why* the inquiry is made."[13]

The trend in administrative law which has led to the sustaining of such an order is inconsistent with the development of the law in analogous areas, which seeks more and more to curb, not to foster, the autocratic exercise of investigatory power. A prime example is the confinement being placed on the investigatory power of the Congress itself,[14] in decisions ranging from *Watkins v. United States*, 354 U.S. 178 (1957), through *Russell v. United States*, 369 U.S. 749 (1962). Compare also the mounting judicial vigilance toward greater restraint in the field of penal law. *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Preston v. United States*, 370 U.S. 364 (1964).

It is inconceivable that this Court could have intended or foreseen that such an anomaly would develop whereby a creature of Congressional action should exercise broader inquisitorial powers than the Congress itself.

C. The trend since Morton Salt and the holding of the court below are contrary to both statutory and Constitutional law

Morton Salt recognized and reaffirmed the principle that a corporation is entitled to a measure of protection[15]

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[13] *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 26 (1936) (supplying emphasis).

[14] Paradoxically, the creator being allowed less power than its creations.

[15] Albeit a less complete one than afforded to a private citizen.

from unreasonable searches and seizures, under the Fourth Amendment to the United States Constitution, which protection extends not only to literal takings but, as well, to the "orderly taking under compulsion of process."[16] But surely such an aimless search as evidenced by the instant order is nothing if not shockingly unreasonable.

Moreover, it is contrary to the declared intent of Congress, which, having traced the growth of the administrative process and finding (unlike the dicta of *Morton Salt)* all *not* "right with the world", enacted the Administrative Procedure Act,[17] to cure some of the more obvious abuses. As this Court acknowledged, also in *Morton Salt:*

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. *It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."* 338 U.S. at 644 (Emphasis supplied).

One such safeguard was provided by Section 6(b) of the Act,[18] which, in the words of the framers, was specifically designed *"to preclude* 'fishing expeditions.' "[19]

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[16]338 U.S. at 652.

[17]5 U.S.C. §§ 1001 et seq.

[18]"(b) *Investigations.*—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law." 5 U.S.C. §1005(b), first sentence.

[19]Report of the Senate Committee on the Judiciary, Sen. Doc. No. 248, 79th Cong., 2d Sess., 205 (1946) (supplying emphasis.)

Both Constitutional and Congressional mandates are destroyed if the present, admittedly "fishing" order, and the judicial policy of laissez-faire that upheld it under *Morton Salt,* have become the law of the land.

Morton Salt, although sustaining the order therein contested, recognized an outer limit to the burdens of officious snoopery in the name of "the public interest". Review should be granted to determine whether that limitation still exists, or whether the principles of *American Tobacco* have become a dead letter.

II.

THE CASE INVOLVES A QUESTION OF PARTICULAR IMPORTANCE TO THE ADMINISTRATION OF THE SHIPPING ACT OF 1916 OVER INTERNATIONAL COMMERCE.

A. The decision of the court below, in sustaining the use by the Federal Maritime Commission of a pre-complaint subpoena power, is in direct conflict with the carefully circumscribed powers granted to the agency by Congress.

Unlike the domestic regulatory statutes,[20] the Shipping Act, operating in the delicate arena of international relations, contains no provision either for visitorial inspection powers or for the power of production and dis-

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[20]All of which, insofar as can be found, seem to possess the broader powers.

covery.[21] Section 27,[22] which contains the Act's only subpoena (or any other production) power, crisply and precisely limits the use of the power to "investigating *alleged violations*". No violations were alleged here. In contradistinction to this, the Federal Trade Commission Act, for example, authorizes the use of subpoenas duces tecum with respect to "any matter under investigation",[23] whether before or after an allegation of statutory violation. The Federal Trade Commission Act also contains (in Sections 6 and 9),[24] in common with other domestic statutes, but unlike the Shipping Act, a broad visitorial power.

Nor can the difference be explained away as a matter of Congressional oversight. In the hearings which led to the 1961 amendments to the Shipping Act,[25] the Federal Maritime Board, the agency then charged with the administration of this Act, expressly brought to Congress' attention the alleged "deficiency" in the statute, both as to the visitorial power and, specifically germane here, to the lack of a pre-complaint subpoena power.[26] In view of

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[21]The Ninth Circuit Court of Appeals has recently ruled that the Shipping Act does not authorize an order for the production and discovery of documents in a complaint proceeding. *Federal Maritime Commission v. Anglo-Canadian Shipping Co., Ltd.*, 335 F.2d 255 (9th Cir. 1964). A fortiori, the Act should not be construed to authorize a production and discovery order *before* complaint is filed.

[22]46 U.S.C. § 826.

[23]Section 9 of the Act, 15 U.S.C. § 49.

[24]15 U.S.C. §§46, 49.

[25]Public Law 87-346, which somewhat ambiguously reversed the effect of this Court's holding in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

[26]See "Additional Recommendations" numbered 3 and 7, reported at pp. 23 and 25 of the Report of the House Committee on Merchant Marine and Fisheries, H.Rep. No. 498, 87th Cong., 1st Sess. (1961).

the power now claimed by the agency, in the instant order, the language of this latter request of the agency to the Congress bears quoting in full:

> "7. An appropriate provision should be inserted in the Shipping Act to *authorize the Board to conduct preliminary investigations* and in aid thereon, *to exercise the power of subpena*, to swear witnesses, and to take and record testimony *antecedent to the filing of any complaint* on the Board's own motion.
>
> "*The purpose of this provision is to enable the Board to conduct proceedings analogous to those of a grand jury.* A somewhat similar procedure is followed by the Federal Trade Commission under the authority vested in it in title 15, United States Code, section 49 and other sections of the Federal Trade Commission Act. While that act authorizes the Commission to file complaints charging violations thereof (15 United States Code, section 45(b)), other sections of the act authorize the Commission to invoke its powers in investigation of possible violations. *At present, the statute does not clearly authorize the Board to exercise its power of subpena in advance of a formal allegation of a violation of the act.* Where the Board becomes apprised of indications of a violation of the act, its investigation into the matter would be materially aided if it clearly were vested with the power to issue the subpenas compelling the attendance of witnesses and the production of papers before a properly designated investigating officer."[27]

The refusal of Congress to grant this request casts grave doubts on the validity of the instant order, accomplishing precisely the same result by another tortuous path.

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[27] *Ibid.*, p. 25 (emphasis supplied; footnote omitted).

For there should be no question that the order does not demand a "report" within the usual meaning of the term in the authorizing section of the statute, Section 21. It expressly calls for "production"—not the "filing" authorized by Section 21. Its demand is exclusively for documents—not data [See JA 189]. And in view of the order's admission that the Commission had not yet "determin[ed] what action if any it should take", there can be no reasonable doubt that the power sought to be exercised is that of pre-complaint subpoena, a power sought by the Commission in 1961 but denied by the Congress in the amendments of that year to the Shipping Act.

Erroneously relying on the imperfect analogy to domestic regulatory statutes, and judicial interpretations thereof,[28] the court below failed even to meet petitioners' argument, relegating it to a mere footnote [see p. 8 of the court's opinion, footnote 5].

B. Particularly in view of the importance of the distinction in the context of this specific statute, this Court should, again reexamining the breadth of language in Morton Salt, reestablish the line between a subpoena and a report.

In *Morton Salt*, and again in *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), this Court sustained, more or less obliquely, the use of a "report-gathering" power as an alternative to the subpoena power. As noted, however, this line-blurring, was, in the context of the statute there being enforced, of no great consequence, since in any case the Federal Trade Commission's pre-

[28]Including, again, *Morton Salt*, and its own earlier decision, similarly relying in this respect on *Morton Salt, Moutship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C.Cir. 1961).

complaint subpoena power would have extended just as far.

As shown, however, under the Shipping Act, the distinction is paramount. There is no pre-complaint subpoena power from which to analogize.

Notwithstanding this, and in purported reliance upon *Morton Salt*, this Commission has in recent years adopted a course of action for ferreting out all information, documents, records, what-have-you, not otherwise accessible to it, simply by declaring the matter a "report" and issuing an order for its "production", citing Section 21 of the Shipping Act. Having failed to comply with the Administrative Procedure Act's requirement that it establish and publish, in advance, "the nature and requirements", and "scope and contents" of all reports[29] to be ordered under Section 21, anything and everything may and does become a "report", to suit the whim of the moment. The Section 21 orders here illustrate the Commission's use of unlimited grand jury powers of investigation, not the limited, statutory powers of the Shipping Act, expressly confining all orders for the production of

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[29]Section 3(a), 5 U.S.C. § 1002(a), which states, in pertinent part: "(a) *Rules.*—Every Agency shall separately state and currently publish in the Federal Register . . . statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations . . . . No person shall in any manner be required to resort to organization or procedure not so published."

It is significant that the Federal Trade Commission had complied with this directive with respect to the report which was the subject of *Morton Salt*—as this Court expressly noted; see 338 U.S. at 644-646. On the other hand, the Maritime Commission brushes aside the Congressional will with a curt, "inapplicable" [JA 38].

documents to "the purpose of investigation of alleged violations of this Act". (Section 27, 46 U.S.C. §826).

In an earlier case involving the same statutory section, this Court rejected the contention that a Section 21 order should be used in place of a Section 27 subpoena, stating, "It is inconceivable" that the Congressional provision of both powers "is mere tautology." *Isbrandtsen-Moller Co. v. United States,* 300 U.S. 139, 144 (1937). By the same token, the Court should now reject the converse notion, embodied in the instant order and upheld by the Court of Appeals, that a Section 27 subpoena may be disguised as an order under Section 21 and thus extended far beyond its legitimate, carefully defined statutory role.

In *Morton Salt,* though sustaining the order there before it, this Court acknowledged:

> "Of course, *there are limits to what, in the name of reports, the Commission may demand.* Just what these limits are we do not attempt to define in the abstract . . . .
>
> ". . . [I]n upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination *or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act."* 338 U.S. at 653, 654.

The case before this Court is most certainly not in the abstract; the meaning of the term "report" as used by Congress in the context of the Shipping Act emphatically denies the use made of it here, to subpoena documents without alleging a violation of the Shipping Act. Unless the quoted words of this Court are but empty rhetoric, this is the place to "define" the "limits."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated at San Francisco, California, this 16th day of November, 1964.

Respectfully submitted,

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(Appendices A and B Follow)

Appendix A

OPINION OF THE COURT BELOW

United States Court of Appeals

For the District of Columbia Circuit

No. 18,468

Far East Conference, petitioner,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,471

North Atlantic Baltic Freight Conference, et al.,
petitioners,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,475

North Atlantic Continental Freight Conference,
et al., petitioners,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,477

Pacific Coast European Conference, petitioner,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,518

Far East Conference, petitioner,

v.

Federal Maritime Commission and
United States of America, respondents

Consolidated Petitions for Review of Orders of
the Federal Maritime Commission

Decided August 20, 1964

Mr. Elkan Turk, Jr., with whom *Mr. Seymour H. Kligler* was on the brief, for petitioner in Nos. 18,468 and 18,518.

Mr. Burton H. White, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Arthur E. Tarantino* was on the brief, for petitioners in Nos. 18,471 and 18,475.

Mr. Charles F. Warren for petitioner in No. 18,477.

Mr. Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, with whom Assistant Attorney General *William H. Orrick, Jr., Messrs. James L. Pimper,* General Counsel, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Before Wilbur K. Miller, Fahy and Wright, *Circuit Judges.*

Fahy, *Circuit Judge:* Nos. 18,468, 18,471, 18,475 and 18,477 may be considered together. Each case is a petition by one or more steamship Conferences, composed of common carriers by water and organized under agreements approved by the Federal Maritime Commission under Section 15 of the Shipping Act of 1916, as amended, 75 Stat. 763, 46 U.S.C. § 814 (Supp. IV, 1961), to review orders of the Commission issued under the authority the Commission claims by reason of Section 21 of the Act.[1]

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[1]Appeals from similar orders directed to other Conferences and involving different trade routes and commodities were previously filed in the Ninth Circuit. For that reason the Commission contends that this court is required to transfer these proceedings to the Ninth Circuit under 28 U.S.C. § 2112(a). That section provides that when proceedings are instituted in two or more courts of appeals with respect to the same agency order the agency shall file the record in that court in which such proceedings were first instituted and the other courts shall thereupon transfer the proceedings concerning such order to the court in which the record has been filed. We do not think that this section is here applicable; for although the requests for production in the orders involved in these cases and the orders appealed from in the Ninth Circuit are substantially identical, the orders themselves cannot be considered the "same order" within the meaning of the statute. Moreover, assuming that aside from the statute it is within the inherent power of the court to transfer the cases in the interest of sound judicial administration, we do not think that this case is an appro-

The orders are not related to any proceeding pending before the Commission on a complaint, but have been issued as part of a "Foreign Trade Study" by the Commission. Section 21 authorizes the Commission to

> require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath, whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary,

followed by penalty provisions for non-compliance. 39 Stat. 736 (1916), 46 U.S.C. § 820 (1958).

Only Part I of the orders is involved.[2] It requires each Conference, as agent for its common carrier members, to produce at the Commission's offices in Washington, D.C., as follows:

> a. A copy of any letters, memoranda, circulars, and other correspondence or documents exchanged between the conference and any of its common carrier member lines and/or any of their agents, during the period January 1, 1962 through September 30, 1963, relating to rates on any of the commodities listed in Attachment A hereto. Documents which merely list or state such rates without discussion need not be furnished.
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> b. A copy of any reports, studies, analyses or documents compiled by or for or received by the con-

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priate one for the exercise of such power since the appeals filed in the Ninth Circuit have already been disposed of by that court.

[2]Other parts of the orders as originally issued have been suspended by Commission order of February 20, 1964.

ference between January 1, 1959 and September 30, 1963, with respect to all rates charged by the conference. Documents which merely list or state such rates without discussion need not be furnished.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

This request was preceded by a recitation of the requirements of certain provisions of the Shipping Act[3] and a

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[3]This part of the order reads as follows:

Under various provisions of the Shipping Act, 1916, and the Merchant Marine Act, 1936, the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States.

Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Under Section 212(e) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged

statement that production of the requested data was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions. . . ."

Accompanying each order was a letter from the Chairman of the Commission stating that certain rates and charges applicable to cargo from certain ports of the United States to certain foreign ports exceeded those applicable to cargo from the foreign ports to ports of the United States, particularly with respect to the commodities listed in Attachment A to the orders; and that the Commission was considering institution of an investigation of the matter pursuant to Section 212(e) of the Merchant Marine Act, 1936, and/or rate proceedings to determine the issue of the detrimental character of the rates within the meaning of Section 18(a) (5) of the Shipping Act, 1916, as amended. The letter continued,

> Prior to the institution of proceedings pursuant to the aforementioned statutory provisions, and if possible to obviate the necessity therefor, we request that you take immediate steps to make appropriate adjustments in your tariffs, particularly with respect to the rates on the commodities enumerated in Attachment A, or that you submit to the Commission statements setting forth all facts and conditions which explain or justify the higher export rates published by your conference. We request your compliance with the foregoing on or before December 15, 1963. For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accom-

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by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discrimination may be corrected.

panying order issued pursuant to Section 21 of the Shipping Act, 1916.[4]

The question is whether the orders are valid. We note first the contention, pressed in No. 18,477, that the letter accompanying the order demonstrates that the Commission's purpose was to force a reduction in rates by requiring the Conferences to "reduce or produce", and that such a coercive tactic constitutes an invalid exercise of administrative authority. We can find no such coercive purpose in the combination of the order and the letter since, as we view the matter, the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested. We have the question whether the orders are valid, not the letters. We cannot hold the orders invalid if, considered apart from the letters, they are within the Commission's authority. *Isbrandtsen-Moller Co. v. United States,* 300 U.S. 139, 145 (1937).

As to this we bear in mind the broad regulatory responsibilities of the Commission, considered with the exemption enjoyed by the Conferences from the antitrust laws by reason of Commission approval of Conference agreements. See *Isbrandtsen Co. v. United States,* 93 U.S.App.D.C. 293, 297, 211 F.2d 51, 55, *cert. denied, Federal Maritime Board v. United States,* 347 U.S. 990 (1954). Within these broad responsibilities is lodged the specific authority here sought to be exercised. As to this we cannot accept petitioners' suggestion that Section 21 orders must be limited to complaint proceedings. They are available to aid investigation without the need for the

[4]By orders of March 12, 1964, March 20, 1964, and April 22, 1964, this court denied the applications of petitioners for interlocutory injunctions restraining enforcement of the Commission's orders pending final determination of the petitions to review. The orders of March 12 also dissolved orders previously entered by this court staying the effectiveness of the Commission's orders in Nos. 18,468 and 18,471.

support of a charge of violation of the Act, or belief even that such a violation is probable. *Isbrandtsen-Moller Co. v. United States, supra* at 144. In this respect the discussion by the Supreme Court in *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), is applicable, though that case involved the investigatory powers of the Federal Trade Commission and not of the Maritime Commission. And see *Pacific Westbound Conf. v. United States*, ___ F.2d ___ (9th Cir. 1964). *Cf. Montship Lines, Ltd. v. Federal Maritime Board*, 111 U.S.App.D.C. 160, 166, 295 F.2d 147, 153 (1961).

We need not discuss whether or not the data demanded, if the demand is otherwise valid, is of the type obtainable under Section 21, namely, "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act"; for petitioners accept the view of the Commission in this respect. At least they do not dispute it in these cases, no doubt in part because of the views expressed by this court in *Montship, supra*, as to the broad construction to be given the enumeration in Section 21 of the kind of data the Commission may require.[5]

There is a contention, however, that a Conference is not an entity to which a Section 21 order may be applied. That section is applicable to "any common carrier by water" or "other person subject to this Act," or "any officer, receiver, trustee, lessee, agent or employee" thereof. The fact is that the Conferences are in many respects agents of the carriers which compose them. If the

[5]Petitioners, however, do contend that an order "to produce" is not authorized by Section 21 since that section literally requires a carrier only "to file" the requested data. Whatever the difference between producing and filing, we think this contention was disposed of by this court's opinion in *Montship, supra*.

Conferences are in possession of the data, and the data is otherwise validly sought, it may not be refused on the theory the Conferences are not answerable to a Section 21 order.

Petitioners also contend that the orders are invalid because the data sought is not reasonably related to the Commission's statutory authority over rates in foreign commerce. They claim that the Commission's only source of control over such rates is Section 18(b)(5) which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States," and under this limited statutory authority the Commission is concerned only with the effect of rates, not with the rate-making processes to which the requested data relates. As we read the statute, however, the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related. We have in mind also the command of Section 212(e) which directs the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected.

A principal argument of petitioners is based on the decisions of this court in the *Montship* case, and in *Hellenic Lines, Ltd.* v. *Federal Maritime Board*, 111 U.S. App.D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities im-

posed upon it by the sections thus referred to. This is clearly an effort by the Commission to meet the defect pointed out in our *Montship* and *Hellenic Lines* decisions, and, like the Ninth Circuit in its recent decision in *Pacific Westbound,* we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. The requirements to be met in the investigatory area of administrative agencies, stated in general terms in the *Morton Salt* case, seem to us to be satisfied in this case:

> [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 338 U.S. 632, 652.

A word now as to the possible oppressiveness of the demand to produce, that is, the difficulty of compliance in relation to the need of the Commission to obtain the information. We have no basis in the record for finding oppressiveness. We rely upon the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying. *Cf. United States* v. *Morton Salt Co., supra* at 653.

No. 18,518. Aside from matters above disposed of, in this case Far East Conference challenges a Section 21 order demanding the data which is described in the copy of the order which is set forth as an Appendix to this opinion. As appears therefrom the data demanded relates to requests and complaints of shippers. Section 15 of the Shipping Act of 1916 was amended in 1961, 75 Stat. 764, 46 U.S.C. § 814 (Supp. IV, 1961), by adding a provision as follows:

> The Commission shall disapprove any such [Section 15] agreement, after notice and hearing, on a finding of . . . failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The order recites that the Commission needs the data

sought so as to be adequately informed as to matters bearing upon its responsibilities under this statutory provision. The objection of petitioner is that the statute vests authority in the Commission with respect to reasonable procedures for hearing and considering shippers' requests and complaints, whereas the order seeks data not as to procedures but as to requests and complaints made, and action taken in connection therewith. But it seems quite clear to us that the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them. The information requested is designed to inform the Commission as to this.

In all the cases we have not neglected to consider Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958), limiting an agency in demanding reports and making investigations except as the agency may be authorized by law. Being of opinion that the orders are authorized by law, it follows we find Section 6(b) no bar to them.

Affirmed.

Circuit Judge WILBUR K. MILLER dissents.

APPENDIX

Section 21 Order

STUDY—CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

Section 15 of the Shipping Act, 1916, requires, among other things that the Commission disapprove any agreement between parties subject to that Act on a finding of

failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified.

Now Therefore, pursuant to the authority vested in it under Section 21 of the Shipping Act, 1916, the Commission hereby orders The Far East Conference (Agreement No. 17), as agent for each of the member lines thereof, to produce at the Commission's offices in Washington, D. C., not later than January 22, 1964 the following:

1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963; inclusive.

2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.

3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.

4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect, identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

By Commission December 27, 1963

Francis C. Hurney
for Thomas Lisi
Secretary

Appendix B

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes

Shipping Act, 1916, 46 U.S.C. §§801 et seq.:

Section 21, 46 U.S.C. §820:

> The Federal Maritime Board and the Secretary of Commerce [now, Federal Maritime Commission] may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

Section 27, 46 U.S.C. § 826:

For the purpose of investigating alleged violations of this chapter, the Federal Maritime Board may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any member of the Board, and oaths or affirmations may be administered, witnesses examined, and evidence received by any member or examiner, or, under the direction of the Board, by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the Board and witnesses shall, unless employees of the Board, be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on application by the Board, be enforced as are orders of the Board other than for the payment of money.

Merchant Marine Act, 1936, 46 U.S.C. §§1101 et seq.:

Section 212(f), 46 U.S.C. §1122(f):

The Federal Maritime Board is authorized and directed—

(f) To investigate, under the regulatory powers transferred to it by this chapter, any and all discrimi-

natory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected.

Administrative Procedure Act, 5 U.S.C. §§1001 et seq.:
Section 2(a), 5 U.S.C. §1002(a):

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Section 6(b), 5 U.S.C. §1005(b):

Except as otherwise provided in this Act—

(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner of for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

Federal Trade Commission Act, 15 U.S.C. §§41 et seq.:
Section 6, 15 U.S.C. §46:

The Commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such re-

ports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

[Sections 6(c)—6(h) omitted].

Section 9, 15 U.S.C. §49:

For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other

person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence

before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.